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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ...71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

against

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 26, 1972.

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GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, as Trustees of the Property of the Penn Central Transportation Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered January 27, 1972, which dismissed the appeal of petitioner from an order of the United States District Court for the Eastern District of Pennsylvania filed September 29, 1970.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and is set out in the Appendix to this

Petition commencing at page 1a. The judgment of the Court of Appeals is set out in the Appendix at page 13a. The orders of the District Court (Order Nos. 63 and 72) are set out in the Appendix commencing at page 15a.

Jurisdiction

The judgment of the Court of Appeals was entered January 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals err in holding that the principles governing questions of standing enunciated by this Court in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) do not apply to railroad reorganization proceedings under Section 77 of the Bankruptcy Act?

2. Whether the New Haven Committee, an active participant in pre-bankruptcy litigation against Penn Central Transportation Company, has standing to protect the fruits of its litigation in the Penn Central Transportation Company reorganization proceedings?

3. Whether the equitable owners of a claim against a railroad in reorganization under Section 77 of the Bankruptcy Act have standing to appeal from an order adversely affecting the value of the claim?

4. Whether the Court of Appeals was correct in holding that the interests represented by the New Haven Committee were "derivative" and that persons having a "substantial derivative interest" in a railroad reorganization proceeding have no right to be heard and to appeal?

Statutes Involved

The statutes involved in this case are: Bankruptcy Act § 77(b) and § 77(c)(13), 11 U.S.C. § 205(b) and 205(c)(13). Those portions of the statutes that are most pertinent to this Petition are as follows:

Section 77(b) of the Bankruptcy Act
11 U.S.C. § 205(b)

> ". . . The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Section 77(c)(13) of the Bankruptcy Act
11 U.S.C. § 205(c)(13)

> ". . . The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene."

Statement of the Case

Petitioner, The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Com-

mittee (the "New Haven Committee") is the representative of the First Mortgage Bondholders of The New York, New Haven and Hartford Railroad Company (the "New Haven"), a Debtor in reorganization.*

The New Haven Committee appealed to the Court of Appeals for the Third Circuit from Order No. 63 of the District Court for the Eastern District of Pennsylvania (the "Reorganization Court") (App. 15a) as amended by Order No. 72 (App. 17a). Order No. 63 was entered without opinion in proceedings for the reorganization of Penn Central Transportation Company ("Penn Central") under § 77 of the Bankruptcy Act (11 U.S.C. § 205). The order resulted from the petition of the Trustees of the property of Penn Central (the "Penn Central Trustees") requesting authority to affirm a Memorandum of Intent with the New York Metropolitan Transportation Agency (the "MTA") and the Connecticut Transportation Authority (the "CTA"). The Memorandum provided for the transfer to MTA and CTA of property which had been transferred to Penn Central by the New Haven on December 31, 1968 pursuant to orders of the Interstate Commerce Commission and the United States District Court for the District of Connecticut acting as the New Haven Reorganization Court.**

Specifically, Order No. 63 permitted the sale of the New Haven's main line between Woodlawn Junction and the New York State border at Port Chester, New York to MTA and the transfer, by lease for a term of sixty years, of the New Haven line from the New York-Connecticut

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* The New Haven is and has been a debtor in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961.

** A description of the transaction is set forth in *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The proceedings there remanded by this Court to the Interstate Commerce Commission ("Commission") have to this date not been set down for hearing by the Commission.

boundary line to the cities of New Haven, Waterbury, Danbury and New Canaan, to CTA. The Penn Central Trustees requested that the transfers be made free of the lien of a Divisional First Mortgage dated as of December 31, 1968, securing the issue of Penn Central 5% Divisional First Mortgage Bonds due January 1, 1994 delivered to New Haven in connection with the December 31, 1968 transfer of the New Haven properties.

The New Haven Committee and the New Haven Trustee appeared before the Reorganization Court at a hearing held on September 23, 1970 and objected to the transfer of the properties free of the first mortgage lien unless the Penn Central Trustees deposited with the Indenture Trustees under the divisional mortgage, not merely the cash received by the Penn Central Trustees, but the fair value of all the consideration received in any form. As noted by the Court of Appeals, the New Haven Trustee compromised and withdrew his objection (App. 3a fn. 4).* The New Haven Committee did not join in the compromise and when the Reorganization Court promptly entered Order No. 63, the New Haven Committee prosecuted its appeal to the Court of Appeals.

Subsequently, the Penn Central Trustees moved in the Court of Appeals to dismiss the appeal on the ground that the New Haven Committee had no standing to bring the

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* The New Haven Trustee had not sought authority from the New Haven Reorganization Court to enter its compromise nor did he seek, or ever receive, approval for this course of conduct. This was not the first time in the long history of the New Haven reorganization proceedings that the New Haven Committee pressed on to oppose agreements made by the New Haven Trustee without the prior approval of the New Haven Reorganization Court. See *New Haven Inclusion Cases, supra,* at 410-11 fn. 46; *New York, N.H. & H.R.R. First Mortgage Bondholders Committee* v. *United States,* 289 F.Supp. 418 (S.D.N.Y. 1968); *New York, N.H. & H.R.R. First Mortgage Bondholders Committee* v. *United States,* 305 F.Supp. 1049 (S.D.N.Y. 1969).

appeal. The motion was argued before a panel of the Court of Appeals,* which then did not determine the motion but continued the motion "for disposition by the panel of this Court which hears argument on the merits in this case."

The contention of the New Haven Committee on the appeal was that the Reorganization Court, although establishing a procedure for determining the extent to which the consideration deposited with the Indenture Trustee was not equal to the value of the entire consideration, erred in ordering (in Paragraph 4, App. 16a) that no matter how far below the fair market value of all elements of consideration the cash consideration will be proven to be,** the amount deposited with the Indenture Trustee will not exceed the cash consideration received and to be received from MTA and CTA, and in permitting the sale without provision for the deposit with the Indenture Trustee of the fair value of the property.

In its opinion, the Court of Appeals stated:

> "Paragraph 4 of the order, however, appears to limit the Penn Central Trustees' obligations to the New Haven Trustee under the Divisional First Mortgage." (App. 4a)

But the Court of Appeals granted the motion of the Penn Central Trustees to dismiss, concluding that the New

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* Argument was heard on April 19, 1971 by Circuit Judges Seitz, Adams and Rosenn.

** It seemed evident that the cash consideration received or to be received was not a full measure of the fair value of the property. The property involved in the transfer to MTA was valued (as of December 31, 1965) at $11.7 million by the Interstate Commerce Commission in the proceedings transferring the property from the New Haven to Penn Central. Under the Memorandum approved by Order No. 63, MTA paid only $7.2 million in cash for the property. In addition, Penn Central received trackage rights and a subsidy relieving it of operating losses.

Haven Committee lacked standing to prosecute the appeal (App. 5a-6a).*

The Court of Appeals, in denying standing to the New Haven Committee, first held that the principles enunciated by this Court in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) and *Flast* v. *Cohen,* 392 U.S. 83 (1968) were "manifestly not intended to apply to a railroad reorganization proceeding" (App. 6a fn. 12). It then held that, although the interest of the New Haven bondholders in assuring that the terms of the mortgage are complied with was "substantial" (App. 7a-8a), their interest was "essentially derivative" from the claim of the New Haven Trustee (App. 9a fn. 17) and that the language and policy of Section 77 compelled the conclusion that "Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order" (App. 8a, fn. 16).

The question as to how "direct" an interest in the subject matter is required to confer standing is of general importance. Especially since the Court of Appeals recognized that the New Haven Committee had a substantial interest in the subject matter of the order and was aggrieved and prejudiced by it.

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* The Court of Appeals stated: "In view of our disposition of this appeal, we need not decide whether there is merit in the New Haven Committee's position . . ." (App. 3a fn. 4).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in significant respects which result in petitioner being deprived of the opportunity to be heard. Important questions involving standing and Section 77 of the Bankruptcy Act are presented.

1. The Court of Appeals erroneously limited the principles enunciated by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970) and erroneously interpreted Section 77 of the Bankruptcy Act.

This Court has recently taken firm steps to insure that those who have an interest which is of the type a statute was designed to protect shall not be denied their day in Court because of an absence of standing. See *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp.*, 397 U.S. 315 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Hardin* v. *Kentucky Utilities Company*, 390 U.S. 1 (1968).

In *Data Processing Service* v. *Camp, supra*, this Court declared that only two questions were required to be answered affirmatively for a plaintiff to have standing. In this Court's language:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (397 U.S. at 152)

The second question was put as follows:

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (397 U.S. at 153)

As to the first question, the New Haven Committee alleged that Order No. 63 caused the bondholders economic injury and the Court of Appeals recognized the reality of the injury claimed. It stated:

> "Thus the New Haven bondholders represented by the Committee have a lien on substantially all of the assets held by the New Haven Trustee, including the Penn Central 5% Divisional First Mortgage Bonds. These New Haven bondholders, therefore, have a substantial derivative interest in assuring that the terms of the mortgage which secures these bonds are complied with. Put in the simplest terms, the more cash that is deposited with the Mortgage Indenture Trustees when former New Haven assets are sold, the more likely it is that the Penn Central's obligations to the New Haven Trustee will be met, and therefore the more likely it is that the New Haven Committee bondholders will have their claims against the New Haven satisfied." (App. 7a-8a)

It seems obvious that the realistic interest sought to be protected by the New Haven Committee is "arguably within the zone of interests to be protected" by Section 77 of the Bankruptcy Act. However, instead of following the tests established by this Court in *Data Processing Service* v. *Camp, supra,* the Court of Appeals, in a footnote, held the principles declared in the *Data Processing Case* and in *Flast* v. *Cohen, supra,* to be inapplicable to Section 77 of the Bankruptcy Act (App. 6 fn. 12). In respect of the language of this Court, it stated:

> "This language, however, was manifestly not intended to apply to a railroad reorganization proceeding, where Congress has enacted a specific statutory scheme which outlines the parties entitled to participate and provides a means by which an 'interested party' may be permitted to intervene . . ." (App. 6 fn. 12)

The "specific statutory scheme" referred to by the Court of Appeals is contained in § 77(c)(13) of the Bankruptcy Act, as follows:

> "The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene."

While § 77(c)(13) specifically declares some persons to be "interested", it also recognizes that persons other than those listed may be "interested". As to the latter, the section attempts no limitation, but suggests a procedure of formal intervention.* The Court of Appeals has concluded that only those persons specifically listed in § 77(c)(13) have standing and the right to be heard. This conclusion simply contradicts the holding in the *Data Processing Case* that persons who allege an injury in fact and who seek to protect an interest "arguably within the zone of interests to be protected or regulated", have standing and the right to be heard.

There is no authority for the holding of the Court of Appeals that § 77(c)(13) was intended as an exclusive list of those who have a right to be heard and none was cited by the Court of Appeals. Generally, the Bankruptcy Laws have been liberally interpreted to allow full participation in reorganization proceedings by interested persons. See *Horowitz* v. *Kaplan*, 193 F. 2d 64 (1st Cir. 1951), cert. denied, 342 U.S. 946 (1952).

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* The Court of Appeals recognized the rule that "the failure to formally intervene will not preclude an appeal if the appellant in fact had a *right* to be heard in the reorganization proceedings." (App. 6a fn. 11) (emphasis in original). See *Horowitz* v. *Kaplan*, 193 F. 2d 64 (1st Cir. 1951), cert. denied, 342 U.S. 946 (1952).

So long as "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution",* the right to be heard should be recognized. There is no valid policy reason for the promulgation of a more limited rule in railroad reorganization proceedings.

2. The Court of Appeals erroneousy limited the definition of a "creditor" under Section 77 of the Bankruptcy Act and arbitrarily denied the New Haven Committee the opportunity to be heard.

Having concluded that § 77(c)(13) of the Bankruptcy Act prevented application of the general principles governing standing in the federal courts, the Court of Appeals then went on to discuss the question of whether the New Haven Committee had standing because the bondholders represented by it were "creditors" under § 77 of the Bankruptcy Act.

Section 77(b) contains the following definitions:

> "The term 'creditors' shall include, for all purposes of this section *all holders of claims of whatever character against the debtor or its property,* whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.
>
> "The term 'claims' *includes debts,* whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock) *liens, or other interests of whatever character.*" (emphasis added)

The broad definitions contained in § 77(b) clearly reflect the intention of Congress to permit any person likely

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* *Flast* v. *Cohen,* 392 U.S. 83, 101 (1968). Here, the New Haven Committee represents those persons who have the largest financial interest in the outcome of these proceedings.

to be economically affected by the reorganization proceedings to be considered as a "creditor". The Court of Appeals, in effect, recognized that the interest of the New Haven Committee was such that it was obviously the "holder of claims". It held, however, that the claims were not "against the debtor or his property" but were "essentially derivative" and that "Congress did not intend that those with simply a derivative interest in a railroad reorganization proceeding have a right to be heard and to appeal" (App. 8a, 9a).

Although limiting its enunciation to a footnote, the Court of Appeals promulgated and applied the following general principle:

> "Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order." (App. 8a fn. 16)

It is submitted that this general declaration is unworkable, unduly restrictive and entirely dependent upon the placing of arbitrary "labels" upon the interests sought to be protected. This Court should grant this petition to consider whether the requirements for standing imposed by the Court of Appeals reflect the intention of Congress.

The harshness of the Court of Appeals' rule is dramatized in the instant case. It is apparent that the New Haven Committee has shown that it "is aggrieved or prejudiced by the order" and that ought to be sufficient to recognize standing as an interested party. But the Court of Appeals has labeled the substantial interest of the New Haven Committee as "derivative" and therefore not a "direct personal interest." The Court of Appeals stated:

> "The lien which these New Haven bondholders once had on the New Haven property . . . was explicitly

> released when this property was transferred to Penn Central on December 31, 1968. Furthermore, the lien which the New Haven bondholders have against the proceeds of the sale to Penn Central does not give them a claim against the Penn Central. The claim against the Penn Central for these proceeds is held by the New Haven Trustee; the New Haven bondholders have a claim only against the amounts which the New Haven Trustee receives from Penn Central." (App. 8a-9a)

The New Haven Trustee is, however simply a fiduciary appointed by a court to conduct proceedings in reorganization. No one can pretend that the New Haven Trustee has a *personal* interest. At best, in traditional trust terms, the New Haven Trustee has legal title while the bondholders hold the equitable title. An equitable interest is not a "derivative interest". The equitable owners are the ones who suffer the injury imposed by the order. This Court has recognized that it is the bondholders who hold the essential rights determined in the long history of this litigation. In *New Haven Inclusion Cases, supra,* this Court said:

> "Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. *We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens.*" (399 U.S. at 489-90) (emphasis added)

The New Haven Committee appeared in the Penn Central proceedings in order to insure that in the course of a "liquidation and per-parcel sale" of property that was theirs by virtue of their mortgage liens, the property should not be transferred without a deposit with the Indenture Trustee of the fair value of the consideration received on such a sale. The Court of Appeals' decision

holds that the bondholders have no standing any longer to protect the rights accorded by this Court.

The Court of Appeals has created rigid and arbitrary requirements for the determination of standing under § 77 of the Bankruptcy Act. The decision of the Court of Appeals has wide and important ramifications in the administration of an important statute and important judicial proceedings and this Court should review the decision of the Court of Appeals.

CONCLUSION

For the reasons above stated, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1972.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,503

In the Matter of:
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 9, 1971

Before VAN DUSEN and ROSEN, *Circuit Judges*,
and LAYTON, *District Judge*

OPINION OF THE COURT

(Filed January 27, 1972)

VAN DUSEN, *Circuit Judge*.

This case involves an appeal by the New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee ("the New Haven Committee") from an order of the District Court for the Eastern District of Pennsylvania sitting as a Reorganization Court In the Matter of Penn Central Transportation Company, Debtor. The order in dispute, Order No. 63, resulted from a peti-

tion filed on September 11, 1970, by the Penn Central Trustees, requesting authority to affirm a Memorandum of Intent with the New York Metropolitan Transportation Authority ("the MTA") and the Connecticut Transportation Authority ("the CTA"). This Memorandum provided for the sale to the MTA of the Penn Central line between Woodlawn Junction and Port Chester in New York (a line formerly owned and operated by the New York, New Haven & Hartford Railroad Company ("the New Haven"))[1] and a 60-year lease to the CTA of the Penn Central lines extending from the New York-Connecticut boundary to the Connecticut cities of New Haven, Waterbury, Danbury and New Canaan (lines also formerly owned and operated by the New Haven).[2] A hearing on the Trustees' petition was held on September 23, 1970, by the Penn Central Reorganization Court. The Trustee of the New Haven and the New Haven Committee appeared at this hearing to object to the conveyances contemplated by the Memo-

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1. Substantially all of the assets and operations of the New Haven were sold to the Penn Central on December 31, 1968. This sale had been required by the Interstate Commerce Commission as a condition of its approval of the merger between the Pennsylvania Railroad and the New York Central Railroad into the Penn Central. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

2. Under the terms of the Memorandum, Penn Central was to receive $7.2 million cash from the MTA and a cash annual rental from the CTA equal to 5% of the aggregate salvage value of the leased lines. (The CTA also was given an option to purchase the leased lines during the term of the lease at a price equal to their salvage value when the option is exercised.) The Memorandum also provided that Penn Central would retain free trackage rights over the transferred lines for 60 years and would receive a minimum cash toll of $2.9 million per year for the use by the MTA and the CTA of the Penn Central track between Woodlawn Junction and Grand Central Station (track not formerly owned by the New Haven). Provision was also made for a service contract under which Penn Central would continue to operate the transferred lines in exchange for an annual management fee of $100,000, plus reimbursement by the MTA and the CTA for any deficits Penn Central incurred in these operations.

randum unless the Penn Central Trustees deposited with the Indenture Trustees of a Penn Central Divisional First Mortgage[3] an amount in cash equal to the fair value of the properties transferred, not simply the cash which Penn Central was to receive in direct payment for the transfers.[4] After some discussion, the hearing was recessed to allow the parties to effect a compromise.

A settlement agreement reached between all the participants except the New Haven Committee was reflected in Order No. 63 of the Penn Central Reorganization Court, dated September 29, 1970. This order authorized the Penn Central Trustees to affirm the Memorandum, but reserved jurisdiction to determine the valuation and disposition of the consideration to be re-

3. When the Penn Central purchased the assets and operations of the New Haven on December 31, 1968, a part of the consideration paid to the New Haven Trustee was an issue of Penn Central 5% Divisional First Mortgage Bonds, which were secured by a Divisional First Mortgage on all the New Haven assets which had been transferred to Penn Central. The New Haven Trustee is the only holder of these Penn Central 5% Bonds.

4. The claim by the New Haven Committee is apparently based upon the following language in the Penn Central Divisional First Mortgage:

Section 10.09(a):

> "[A]ll cash and securities receivable from any and all sales or condemnations of Mortgaged Properties, plus any cash required to be paid by the Company to the Corporate Trustee pursuant to §10.08, shall be deposited with the Corporate Trustee and held by it as Deposited Cash and Securities."

Section 10.08(4):

> "[There shall also be deposited] [s]uch cash, if any, to be held by the Corporate Trustee as Deposited Cash and Securities as shall be equal to the excess of the fair value of the portion of the Mortgaged properties being released pursuant to section 10.01 over the fair value of the proceeds to be received, as shown by the officers' Certificate."

In view of our disposition of this appeal, we need not decide whether there is merit in the New Haven Committee's position (which apparently was first advanced and then compromised by the New Haven Trustee).

ceived by the Trustees from the MTA and the CTA.[5] Paragraph 4 of the order, however, appears to limit the Penn Central Trustees' obligations to the New Haven Trustee under the Divisional First Mortgage.[6] The New

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5. Presumably also reserved for future resolution was the issue raised by the New Haven Committee as to whether the 60-year lease to the CTA constitutes a sale within the meaning of the Penn Central Divisional First Mortgage. See footnote 4, *supra*.

Pending these determinations, the Penn Central Trustees were directed to deposit all cash consideration received with respect to property released from the Divisional First Mortgage lien with the Mortgage Indenture Trustee (¶3(a)) and to deposit other cash received pursuant to the Memorandum in a special bank account (¶3(b)). But see footnotes 6 & 20, *infra*.

6. Paragraph 4 of Order No. 63 declares as follows:

> "4. The obligations, if any, to be discharged by the Debtor's Trustees hereunder with respect to the claims of persons other than MTA and CTA are hereby limited to an amount which shall not exceed the sum of cash received from the sale of any property subject to the lien of the Divisional Mortgage leased to CTA pursuant to said lease plus annual rental payments as and when received by the Debtor's Trustees under said lease."

Because of our disposition of this appeal, we need not decide whether the limitation contained in this paragraph is appropriate. We note that the Penn Central Reorganization Court has an obligation to protect the interests of the creditors and the public interest. See *Penn Central Merger Cases*, 389 U.S. 486, 507-11 (1968); *New Haven Inclusion Cases*, 399 U.S. 392, 489-95 (1970). Section 77(o) of the Bankruptcy Act, 11 U.S.C. §205(o) declares that when the reorganization court orders the sale of property free from liens, the "proceeds derived from any such sales shall be received by the trustee . . . subject . . . to any liens thereon at the time of sale . . . ." Paragraph 2 of Order No. 63 appears consistent with the above-quoted language and paragraph 4 must be read in light of the other paragraphs of the order.

Order No. 147 of the Penn Central Reorganization Court dated January 26, 1971 (the substance of which was approved by the New Haven Reorganization Court on January 27, 1971, after a hearing on January 22, 1971), authorized the division between the Penn Central Trustees and the New Haven Trustee of approximately $18 million held by the Indenture Trustees of the Penn Central Divisional First Mortgage, which money included deposits made

Haven Committee objected to the entry of this order, largely because of the limitation contained in paragraph 4.[7] This appeal followed.[8]

A threshhold issue in this appeal involves the authority of the New Haven Committee to appeal the entry of Order No. 63 by the Penn Central Reorganization Court.[9] For the reasons to be stated, we conclude that the New Haven Committee is not authorized by the controlling bankruptcy statutes to prosecute this appeal. We there-

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pursuant to ¶3(a) of Order No. 63. The Penn Central Trustees contended that this division and distribution of funds permitted the continued operation of the Penn Central Railroad at a time when such operation was *in extremis* (N. T. 1133). See *In the Matter of Penn Central Transportation Co., Debtor, First Wisconsin National Bank, Appellant* (3rd Cir., Nos. 19,340-19,346, decided December 23, 1971), where Judge Hastie pointed out:

> "Even secured creditors of a railroad must submit to the risk inherent in judicial suspension of the rights they normally would have to enforce their liens against property of the debtor during the pendency of a reorganization proceeding. New Haven Inclusion Cases, 1970, 399 U.S. 392, 489-94."

See also Central RR. v. Manufacturers Hanover Trust Co., 421 F.2d 604 (3rd Cir. 1970). Further, the division of the $18 million between the New Haven Trustee and the Penn Central Trustees was in the nature of a settlement agreement (N. T. 1127-29, 1135 ff.) and such agreements, insofar as those participating in them are concerned, are favored by the law. See *Kelly v. Greer*, 365 F.2d 669, 671 (3rd Cir. 1966); *Main Line Theaters v. Paramount Film Distributing Corp.*, 298 F.2d 801 (3rd Cir.), *cert. denied*, 370 U.S. 939 (1962).

7. On October 27, 1970, the Penn Central Reorganization Court entered Order No. 72, which amended Order No. 63 to make it clear (1) that the New Haven Committee had not consented to Order No. 63, but (2) that no other party would be deemed to have agreed that the New Haven Committee had standing to object.

8. The New Haven Committee filed its Notice of Appeal on October 23, 1970; but did not seek either a stay of execution from the Penn Central Reorganization Court or a supersedeas from this court. Accordingly, on January 4, 1971, the transfers contemplated by the Memorandum were concluded.

9. On March 3, 1971, the Penn Central Trustees filed a motion in this court to dismiss the appeal of the New Haven Committee on the ground, *inter alia*, that it lacked standing to appeal. On May 4,

fore grant the motion made by the Penn Central Trustees to dismiss the appeal.[9]

The standing of a participant to a railroad reorganization to appeal from an order of the reorganization court turns on whether Section 77(c) (13) of the Bankruptcy Act, 11 U.S.C. §205(c) (13) (1964), grants him a right to be heard.[10] See *Horowitz v. Kaplan*, 193 F.2d 64, 66 (1st Cir. 1951); *In re Keystone Realty Holding Co.*, 117 F.2d 1003, 1005 (3d Cir. 1941). Section 77(c) (13) grants this right to be heard to the "debtor, any creditor or stockholder."[11] Thus the New Haven Committee is authorized to bring this appeal only if it is a "creditor" or a "stockholder" of the Penn Central as these terms are defined in the Bankruptcy Act.[12]

Note 9—*Continued*
1971, after the filing of briefs and oral argument, this motion was continued for disposition by the panel hearing the merits of the appeal.

10. The fact that the New Haven Committee was allowed to participate in the Penn Central Reorganization Court proceedings does not give rise to an automatic right of appeal. *See Peckham v. Casalduc*, 261 F.2d 120, 121 (1st Cir. 1958), *cert. denied*, 359 U.S. 958 (1959) (Chapter X Reorganization).

11. Section 77(c)(13) also provides that "upon petition therefor and cause shown . . . any other interested party may be permitted to intervene." The New Haven Committee, however, did not petition to intervene, so that it cannot claim a right to appeal as an intervenor. On the other hand, the failure to formally intervene will not preclude an appeal if the appellant in fact had a *right* to be heard in the reorganization proceedings. See *Horowitz v. Kaplan*, 193 F.2d 64, 66 (1st Cir. 1951).

12. The New Haven Committee has argued that the broad language respecting standing in several recent decisions of the Supreme Court, particularly *Data Processing Service v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968), supports its right to appeal the entry of Order No. 63. This language, however, was manifestly not intended to apply to a railroad reorganization proceeding, where Congress has enacted a specific statutory scheme which outlines the parties entitled to participate and provides a means by which an "interested party" may be permitted to intervene (see footnote 11, *supra*). *See Data Processing Service v. Camp*, 397 U.S. 150, 154, 157 (1970).

The New Haven appears to argue that it is a "creditor" of the Penn Central because of the very substantial interest which its members have in the property which the New Haven Trustee receives from the Penn Central. The members of the New Haven Committee are the holders of New Haven First Mortgage 4% Bonds which were outstanding at the time that the assets and operations of the New Haven were sold to Penn Central on December 31, 1968.[13] The transfer of assets to Penn Central, however, was made free of this mortgage lien, with the lien attaching to the proceeds of the sale held by the New Haven Trustee.[14] Thus the New Haven bondholders represented by the Committee have a lien on substantially all of the assets held by the New Haven Trustee, including the Penn Central 5% Divisional First Mortgage Bonds.[15] These New Haven bondholders, therefore, have a substantial derivative interest in assuring that the

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13. See footnote 1, *supra*.

14. After extensive negotiations and proceedings, the New Haven Reorganization Court on December 24, 1968, approved the release of the New Haven assets to the Penn Central pursuant to a plan of sale under which the transfers were to be substantially free and clear of all liens and encumbrances; these liens and encumbrances shifted to the proceeds of the sale and thereby remained an obligation of the New Haven estate. See *New Haven Inclusion Cases*, 399 U.S. 392, 410-16, 410 n. 45 (1970). This transfer of the liens and encumbrances from the assets themselves to the proceeds of sale is authorized by the following language of Section 77(o) of the Bankruptcy Act, 11 U.S.C. §205(o):

> "The judge may order and decree any sale of property . . . subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee . . . subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct."

15. The total price to be paid by Penn Central for the New Haven assets and operations has not yet been finally determined and is the subject of litigation which has already reached the Supreme Court. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). Of course, the Committee has a very substantial interest in

terms of the mortgage which secures these bonds are complied with. Put in the simplest terms, the more cash that is deposited with the Mortgage Indenture Trustees when former New Haven assets are sold, the more likely it is that the Penn Central's obligations to the New Haven Trustee will be met, and therefore the more likely it is that the New Haven Committee bondholders will have their claims against the New Haven satisfied.

The relevant language of the Bankruptcy Act indicates, however, that Congress did not intend that those with simply a derivative interest in a railroad reorganization proceeding have a right to be heard and to appeal. *See Callaway v. Benton*, 336 U.S. 132, 139 (1949); *Boston & Providence Railroad Stockholders Development Group v. Smith*, 333 F.2d 651 (2d Cir. 1964). *Cf. Peckham v. Casalduc*, 261 F.2d 121 (1st Cir. 1958).[16] Section 77(b) of the Act, 11 U.S.C. §205(b), provides as follows:

> "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character *against the debtor or his property* . . . ." (emphasis added.)

This record requires the conclusion that the members of the New Haven Committee do *not* hold claims against either the Penn Central or the property of the Penn Central, as required by the language of Section 77(b). The lien which these New Haven bondholders once had on the

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Note 15—*Continued*

the determination of this purchase price and, in fact, has actively participated in the New Haven Reorganization Court litigation. See 399 U.S. at 489-95.

16. Standing to appeal an order of a railroad reorganization court requires a direct personal interest in the subject matter of the order and a showing that the appellant is aggrieved or prejudiced by the order. *See, e.g., Comstock v. Thompson*, 158 F.2d 151 (8th Cir. 1946); *In Re Huntingdon & Broad Top Mt. RR. & Coal Co.*, 213 F.2d 411 (3rd Cir. 1954).

New Haven property (some of which Penn Central has transferred to the MTA and the CTA pursuant to Order No. 63) was explicitly released when this property was transferred to Penn Central on December 31, 1968.[17] Furthermore, the lien which the New Haven bondholders have against the proceeds of the sale to Penn Central[18] does not give them a claim against the Penn Central. The claim against the Penn Central for these proceeds is held by the New Haven Trustee; the New Haven bondholders have a claim only against the amounts which the New Haven Trustee receives from Penn Central. Thus, since the members of the New Haven Committee do not have claims either against Penn Central property or against the Penn Central, they are not "creditors" of Penn Central within the applicable language of the Bankruptcy Act and, therefore, had no automatic right either

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17. See pp. 7-8 and footnote 14, *supra*.

The New Haven Committee argues that it is not entirely clear that the New Haven property has finally passed to the Penn Central in view of the Supreme Court's decision that the Penn Central must pay more for this property than the amounts originally determined by either the I.C.C. or the New Haven Reorganization Court. The New Haven Committee argues that the New Haven Trustee now holds an "equitable lien" on the former New Haven property because the I.C.C. and the New Haven Reorganization Court may yet decide that the entire transaction (that is, the sale of the New Haven to Penn Central) should be undone and the property returned to the New Haven. But even if the New Haven Trustee has such an "equitable lien" on this property (see holding of New Haven Reorganization Court quoted at footnote 2 of *In the Matter of Penn Central Transportation Company, Debtor, Smith, Trustee, appellant,* F.2d (opinion of 1/3/72, 3rd Cir., Nos. 71-1582 and 71-1734)), it does not follow that the New Haven bondholders have a claim to the property within the meaning of Section 77(b) of the Act. As in the case of the claim to the proceeds of the sale of the New Haven assets to Penn Central (discussed below), the claim of the New Haven Committee is essentially derivative from the claim of the New Haven Trustee and thus does not fall within the terms of Section 77(b).

18. See footnote 3, *supra*.

to be heard in the Penn Central reorganization or to appeal the entry of Order No. 63.[19]

This result will effectuate the purposes of Section 77 of the Bankruptcy Act. If those with purely derivative interests in a railroad reorganization were allowed not only to participate in these proceedings but also to appeal from the resulting decisions, the already complicated and elaborate reorganization process developed by Congress might become hopelessly confounded. Further, there is no reason to believe that the New Haven Trustee will not adequately protect the interests of creditors of the New Haven, including the members of the New Haven Committee, in the Penn Central reorganization proceedings. Finally, we have held only that the New Haven Committee has no right to appeal from a decision reached in the Penn Central Reorganization Court. This is not to say, however, that the New Haven Committee was prevented from contesting the terms of the arrangement embodied in Order No. 63 in another, more appropriate forum.[20]

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19. The New Haven Committee has suggested that its members should be considered "stockholders" of the Penn Central because of the possibility that they will own all the stock of the New Haven. Even if this were to occur, however, it would not aid the Committee, since it is clear that the stockholders of a creditor are not themselves "creditors" within the meaning of Section 77(b). See *Callaway v. Benton*, 336 U.S. 132, 139 (1949).

20. For example, the New Haven Committee is a party to the New Haven reorganization proceedings and it might have initiated an action in that court to challenge the New Haven Trustee's agreement to the entry of Order No. 63 if it felt that this agreement violated the terms of the Penn Central Divisional First Mortgage. See footnotes 3 & 4, *supra*. Indeed, the appropriateness of this agreement was at least indirectly before the New Haven Reorganization Court at a hearing on January 22, 1971 sur Petition of Trustee For Approval of Agreement with Penn Central Trustees dated 1/20/71, reciting in paragraph 4 the agreement to divide the funds as stated in note 6 above, after which that court entered its Order No. 631 on 1/27/71 approving this agreement. The effect of Orders 631 and 147 (in which the Penn Central Reorganization Court approved this agreement on 1/26/71) was to modify ¶3(a)

For the foregoing reasons, we grant the Penn Central Trustees' motion to dismiss the appeal.

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of Order No. 63 to allow a distribution of the money held by the Mortgage Indenture Trustees (see footnotes 5 & 6, *supra*). The New Haven Committee, though a party to the New Haven reorganization proceedings, did *not* object to the court's approval of the agreement (see N.T. of 1/22/71 hearing).

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of the Court of Appeals

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 19,503

In the Matter of:
PENN CENTRAL TRANSPORTATION COMPANY, Debtor

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant

(D. C. No. In Bankruptcy No. B-70-347)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, ROSEN, *Circuit Judges* and LAYTON, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal from Order No. 63 of the said District Court, filed September 29, 1970, be, and the same is hereby dismissed. Costs are taxed against the appellant.

ATTEST:

M. Elizabeth Ferguson,
Chief Deputy Clerk

January 27, 1972

Order No. 63

Authorizing Trustees to affirm a Memorandum of Intent among Metropolitan Transportation Authority, Connecticut Transportation Authority and the Debtor.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[SAME TITLE]

AND NOW, this 29th day of September, 1970, the petition of the Trustees of the Debtor's property in the above matter having come on for hearing, on notice duly given in accordance with the Order of notice, and the Court being fully advised in the premises and having noted the consent of all objecting participants therein to the form of order hereinafter set forth, it is ORDERED:

1. The Trustees are authorized to affirm the Memorandum of Intent described in the Petition for this Order;

2. The Trustees are authorized to negotiate and execute, subject to the approval of this Court, any instruments and contracts and to perform any acts necessary to implement the aforesaid Memorandum of Intent;

3. Jurisdiction is reserved in this Court to determine the valuation and disposition of the consideration received by the Trustees in the aforesaid transactions and to determine the respective rights of the Trustees and the objecting participants making claims with respect thereto. Pending such determination, the Trustees are directed:

Order Number 63 Authorizing Trustees to Affirm a Memorandum of Intent Among Metropolitan Transportation Authority, Connecticut Transportation Authority and the Debtor.

(a) to deposit with The Fidelity Bank and Joseph F. McDonald, as Trustees under an indenture from the Debtor dated as of December 31, 1968, securing 5% Divisional First Mortgage Bonds due January 1, 1994 (the Divisional Mortgage) all cash consideration received by the Debtor's Trustees specified to be with respect to land to be released from the lien of the Divisional Mortgage, and

(b) to deposit in a special bank account designated as pursuant to this Order consideration received for MU cars as specified in the Petition and as rental for the properties to be leased to CTA in Connecticut as specified in the Petition.

4. The obligations, if any, to be discharged by the Debtor's Trustees hereunder with respect to the claims of persons other than MTA and CTA are hereby limited to an amount which shall not exceed the sum of cash received from the sale of any property subject to the lien of the Divisional Mortgage leased to CTA pursuant to said lease plus annual rental payments as and when received by the Debtor's Trustees under said lease.

5. This Order is without prejudice to the rights of Debtor's Trustees and parties or persons having objected to the Trustees' Petition for this Order at the hearing thereon to seek the adjudication contemplated by Paragraph 3 hereof, *provided however*, that the liabilities and obligations of either MTA or CTA shall not be other than as are stated in the documents implementing the petition.

JOHN P. FULLAM,
JOHN P. FULLAM,
District Judge.

Order No. 72 Amending Order No. 63.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[SAME TITLE]

AND NOW, this 27th day of October, 1970, by agreement of counsel, Order No. 63 heretofore entered in this matter on September 29, 1970, is hereby amended to reflect the fact that the New York, New Haven & Hartford Railroad Co. First Mortgage 4% Bondholders Committee did not consent, and has not consented, to the entry of Order No. 63.

By consenting to the entry of the foregoing amendment to Order No. 63, neither the Trustees nor any other party shall be deemed to have agreed that the said Bondholders Committee has, or ever had, standing to object to the entry of said Order No. 63.

JOHN P. FULLAM,
Justice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

BRIEF FOR THE METROPOLITAN TRANSPORTATION AUTHORITY IN OPPOSITION

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Attorney for Respondent

May 1972

Washington, D. C. THIEL PRESS 202 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1384

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Petitioner,

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GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ as Trustees of the Property of the Penn Central Transportation Company and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

BRIEF FOR THE METROPOLITAN TRANSPORTATION AUTHORITY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 455 F.2d 811.